television ownership are necessary to promote competition. Accordingly, pursuant to the directive of Section 202(h), we herein modify our local TV ownership rule.

134 Our modified local TV ownership rule will permit an entity to have an attributable interest in two television broadcast stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. To further ensure that no single entity possesses excessive market power, however, we will prohibit combinations which would result in a single entity acquiring more than one station that is ranked among the top four stations in the market based on audience share. As a result, no combinations will be permitted in markets with fewer than five television stations. Because we have determined that Nielsen DMAs are the relevant geographic market, common ownership of stations in the same market will be subject to this standard without regard to whether the affected stations have overlapping contours, and we eliminate the provision of our local TV ownership rule that permits same-market combinations where there is no Grade B contour overlap We also modify our existing standard for waiver of the local TV ownership rule.

135. *Background.* The Commission adopted a rule prohibiting common ownership of two TV stations with intersecting Grade B contours in 1964 [258] The rule was based in part on the Commission's earlier "diversification of service" rationale, which reflected the belief that diversity concerns were best promoted by a multiplicity of separately owned outlets.[259] In 1996, Congress directed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market."[260] The Commission revised the rule to its current form in 1999, citing as reasons the growth in the number and variety of local media outlets and the efficiencies and public service benefits that can be obtained from joint ownership.[261] The Commission also sought to "facilitate further development of competition in the video marketplace and to strengthen the potential of broadcasters to serve the public interest."[262]

136. In *Sinclair Broadcast Group, Inc. v. FCC*,[263] the court reviewed the Commission's decision modifying the local TV ownership rule [264] The court held that there was a rational relationship between the rule and our diversity and competition goals The court noted that choosing the number eight and defining voices "are quintessentially matters of line drawing invoking the Commission's expertise in projecting market results," and did not decide the issue of whether eight is the appropriate numerical limit. The court invalidated, however, the Commission's definition of voices under the rule because it did

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[258] *1964 Media Ownership Report and Order, supra* note 56.

[259] *Genesee Radio Corp., supra* note 88

[260] 1996 Act, § 202(c)(2)

[261] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12930-31 ¶¶ 57-58.

[262] *Id* at 12903 ¶ 1. The Commission made relatively minor changes to the rule on reconsideration *See Local TV Ownership Recon Order, supra* note 96.

[263] *See Sinclair, supra* note 7

[264] In *Sinclair*, the court reviewed challenges to the local TV ownership rule as well as to grandfathering provisions related to local marketing agreements *Id* 284 F.3d at 162.

not adequately explain its decision to include only broadcast television stations as voices The court pointed out that the definition was inconsistent with the definition of voices for the radio/TV cross-ownership rule,[265] which also considers major newspapers and cable television to be voices. The court observed that "[o]n remand, the Commission conceivably may determine to adjust not only the definition of 'voices' but also the numerical limit."[266]

### 1. The Current Rule Cannot be Justified Under Section 202(h)

137 Under Section 202(h), we consider whether the local TV ownership rule continues to be "necessary in the public interest as a result of competition." Our *Notice* sought comment on this issue, including the following specific questions: (a) whether the rule presently serves its original purposes of furthering diversity and facilitating competition in the marketplace; (b) whether the rule promotes other policy goals discussed in the *Notice*; and (c) whether, if the rule serves some of our purposes and disserves others, the balance of its effects argues for keeping, revising, or eliminating the rule.[267]

138. Commenters proposing repeal or relaxation of the rule believe that the rule is not necessary in the public interest to achieve its intended competition and diversity goals.[268] They assert that, to the contrary, the rule is harming competition by preventing broadcasters from achieving efficiencies that will allow them to compete more effectively with other media outlets, including video programming available via cable, DBS, home video, and video rentals, as well as other media such as radio, digital audio radio service ("DARS"), newspapers and the Internet. These commenters contend that the current rule, by focusing solely on competition among local television broadcast stations, fails to account for today's competitive media marketplace.[269] They likewise contend that in light of the broad range of media options available to the public, the rule is no longer necessary in the public interest to promote our diversity goal.[270] These commenters argue that if the rule is relaxed or repealed, single owners of multiple television broadcast outlets will have an equal or enhanced incentive and ability to

[265] 47 C F R § 73 3555(c)(iii, iv)

[266] *Sinclair*, 284 F 3d at 162

[267] *Notice*, 17 FCC Rcd at 18528 ¶ 75.

[268] Alaska Comments at 3, Statement of Victor B. Miller IV, Senior Managing Director Bear, Stearns & Co at FCC Field Hearing on Media Ownership (Feb. 27, 2002) at 5 ("Bear Stearns En Banc Statement"); Block Comments at 5; Bonneville Comments at 5; Coalition Broadcasters Comments at 11-13; Emmis Comments at 14, Fox Comments at 3-5, FMBC Comments at 1-2; Gannett Comments at 21-28; Granite Comments at 11-12; Gray Comments at 16; NAB Comments at I, 5-6, Nexstar Comments at 16, Paxson Comments at 4, Sinclair Comments at 20-21.

[269] Alaska Comments at 4-5, Bear Stearns En Banc Statement at 1, 5; Belo Comments at 14, 25; Coalition Broadcasters Comments at 4-6; Duhamel Comments at 5-6; Emmis Comments at 31-33; Fox Comments at 3, 6; Gray Comments at 6-16; Granite Comments at 3-6, 8-10; Hearst-Argyle Reply Comments at 2-6; Media General *et al* Comments at 3-7, NAB Comments at 8-14; Nexstar Comments at 13-18; Pappas Comments at 12-14, Paxson Comments at 5-6, 29-30, Sinclair Comments at 8-19.

[270] Alaska Comments at 4-5, Bear Stearns En Banc Statement at 5, Belo Comments at 12-19, Coalition Broadcasters Comments at 4-8, Duhamel Comments at 7, Emmis Comments at 25-30; Fox Comments at 33-34; Gray Comments at 6-15; Granite Comments at 10-11; Hearst-Argyle Reply Comments at 8-9; Media General *et al.* Comments at 7; NAB Comments at 15-18; Nexstar Comments at 6-13, Pappas Comments at 12-15; Paxson Comments at 27-29; Sinclair Comments at 20-37

offer programming that is diverse in terms of both viewpoint and program format[271] Finally, these commenters contend that the current rule does not promote localism. Rather, they contend that the rule is harming localism by preventing combinations that would yield efficiencies that would expand local news offerings and other programming relevant to the needs and interests of viewers in local markets[272]

139. Commenters who urge us to retain the current rule assert that relaxation of the rule will harm competition, diversity, and localism[273] These commenters contend that competition will be harmed because non-consolidated broadcasters will face anticompetitive behavior from broadcasters who own more than one station within a local market.[274] They assert that there is a clear connection between ownership and viewpoint diversity because owners can and do express viewpoints through their editorial control over what is aired.[275] They urge us to retain the current rule in order to promote the public's First Amendment interest in a robust marketplace of ideas, and to protect the viewpoint diversity that they state is critical to ensuring an informed electorate.[276] They also contend that further consolidation in local television markets will result in less local control over programming.[277] We address each of these arguments below in our analysis of whether the current rule remains necessary in the public interest as required by section 202(h).

**a. Competition**

140. We conclude that the current local TV ownership rule is not necessary to protect competition By limiting common ownership of television stations in local markets where at least eight independently owned TV stations would remain post-merger, the current rule prohibits mergers that would increase efficiency in small and mid-sized markets—mergers that would thereby promote competition In addition, by limiting common ownership to no more than two television stations, the

[271] Alaska Comments at 6; Bear Stearns En Banc Statement at 5, Belo Comments at 22-24, Coalition Broadcasters Comments at 6-7; Duhamel Comments at 6-7, Fox Comments at 30-32, Gray Comments at 17; Granite Comments at 14, Hearst-Argyle Reply Comments at 7-8, Media General *et al.* Comments at 2; NAB Comments at 36-37; Nexstar Comments at 10, 13, Pappas Comments at 14, Sinclair Comments at 16-18, 26-27.

[272] Alaska Comments at 5-6, Bear Stearns En Banc Statement at 5; Belo Comments at 12; Coalition Broadcasters Comments at 4-5; Fox Comments at 35-41, Gray Comments at 16-19, Granite Comments at 3-7; Media General *et al* Comments at 5, 7; NAB Comments at 40, Paxson Comments at 28, Sinclair Comments at 30, 54

[273] AFL-CIO Comments at 49, AFTRA Comments at 3, 14, CFA Comments at 184; CWA Comments at 11, 16; Children Now Comments at 11-12, 18, 23, Entravision Comments at 3-8; UCC Comments at 39-41

[274] AFL-CIO Comments at 31; AFTRA Comments at 3, 25-26, CFA Comments at 186-187 Entravision makes a similar assertion, although it does not take a position on whether to relax the local ownership rule Entravision Comments at 6-10 Instead, Entravision proposes that we address anticompetitive conduct by establishing certain other requirements *Id*

[275] AFL-CIO Comments at 15-25; AFTRA Comments at 11-14; CFA Comments at 263; CWA Comments at 28-32; UCC Comments at 4-9.

[276] AFL-CIO Comments at 3, 5-9, AFTRA Comments at 11, CFA Comments at 30-32; CWA Comments at 1-3; UCC Comments at 61-64

[277] AFL-CIO Comments at 51-53, AFTRA Comments at 10-12; CFA Comments at 250-252, CWA Comments at 30-32; Children Now Comments at 12; UCC Comments at 12-17.

current rule prohibits efficiency enhancing mergers in the largest markets. The current rule also prohibits mergers among the top four-ranked stations.[278] After reviewing all of the record evidence, we conclude that this restriction remains necessary to promote competition, so we are retaining a prohibition on mergers of the top four-ranked stations in the modified local TV ownership rule we are adopting today. Today's decision benefits from numerous empirical studies that provide a wealth of competition information not previously available.[279]

141. In the *Notice*, we requested comment on the definition of the product and geographic markets in which broadcast television stations compete. Based on the record, we conclude that broadcast television stations operate in three product markets a market for delivered video programming ("DVP"); a video advertising market, and a video program production market.[280] Although each of these markets is discussed below, our primary concern is promoting competition for viewers Therefore, we will focus on competition in the DVP market. It is this market that directly affects viewers. The advertising market and the program production market are of concern to the Commission only to the extent that protecting competition in these markets may add an extra level of protection for the public and enable all television broadcasters to compete fairly for advertising revenue and programming. What is critical to our competition policy goals, however, is the assurance of a sufficient number of strong rivals actively engaged in competition for viewing audiences. As long as there are numerous rival firms in the DVP market, viewers' interests will be advanced. We first analyze the DVP market.

**(i) The DVP Market**

142. The evidence in the record suggests that television viewers do not consider non-video entertainment alternatives (*e g.*, reading and listening to music) and non-delivered video (*e.g.*, VCRs/DVDs and movie theaters) to be good substitutes for watching television.[281] In defining the market, we follow the *DOJ/FTC Merger Guidelines* and ask whether the availability of entertainment alternatives is sufficient to prevent a significant and non-transitory increase in price. If they were good substitutes to watching television, relative changes in prices or other competitive variables should change

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[278] "The 'top four-ranked station' component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition " *Local TV Ownership Report and Order*, 14 FCC Rcd at 12933-34 ¶ 66.

[279] *See, e g , Id* at 12918 ¶ 31. ("We are aware of no definitive empirical studies that quantify the extent to which the various media are substitutable in local markets ").

[280] Fox Comments, Exhibit 3, Bruce M Owen, *Statement on Media Ownership Rules* (Jan 2003) at 1-2 ("Fox Comments, Owen Statement")

[281] In defining the relevant product market for merger analysis, one starts with the products supplied by the merging firms and asks whether a monopolist, supplying those products, would profitably impose "a small but significant and non-transitory price increase." If the monopolist would not be able to impose such a price increase, then one adds in the next closest substitute to the products of the merging firms and repeats the experiment Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at http //www usdoj gov/atr/hmerger/11256 htm (visited Mar. 20, 2003) This approach has been referred to as the "smallest market principle "

household consumption of television [282] The record evidence suggests, however, that, while the price of subscribing to cable and DBS has increased faster than the rate of inflation, these price increases have not resulted in households dropping their subscriptions to cable and DBS,[283] or reducing the amount of time households spend watching television. In fact, the amount of time households spend watching DVP on television has remained unchanged for 30 years.[284] Thus, DVP providers have indeed been able to impose non-transitory price increases This suggests that the relevant product market is no broader than DVP and should not include all entertainment activities.

143. For most viewers the programming choices offered by local broadcast television stations and cable networks represent good alternatives for one another Most households subscribe to cable or DBS and receive DVP from cable networks and local broadcast television stations.[285] These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television stations The ease of switching from broadcast to cable networks for these households provides strong incentives for cable networks and local broadcast television stations to provide programs that attract viewers. The owners of cable networks and local broadcast television stations know that anything that reduces a program's appeal will cause cable and DBS subscribers to switch to programming offered by other cable networks or broadcast stations.[286] As such, all the broadcast television stations and cable networks available to a significant number of cable subscribers in a

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[282] Horizontal Merger Guidelines issued by the U S. Department of Justice and the Federal Trade Commission, 57 Fed Reg 41552 (dated Apr 2, 1992, revised, Apr. 8, 1997) ("*DOJ/FTC Merger Guidelines*") Section 1.11 of the *DOJ/FTC Merger Guidelines* states "In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following· (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables .."

[283] Over the past several years, despite the fact that prices for MVPD service, particularly cable, have increased significantly, the percentage of households subscribing to such service also has increased *See, 2002 Video Competition Report, supra* note 98. *See also Reports*, 1994-2001· *1994 Video Competition Report, supra* note 138, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 11 FCC Rcd 2060 (1996) (*"1995 Video Competition Report"*), *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 12 FCC Rcd 4358 (1997) (*"1996 Video Competition Report"*), *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 13 FCC Rcd 1034 (1998) (*"1997 Report"*), *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 13 FCC Rcd 24284 (1998) (*"1998 Video Competition Report),* and *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 15 FCC Rcd 978 (2000) (*"1999 Video Competition Report"*); *2000 Video Competition Report, supra* note 223, *2001 Video Competition Report, supra* note 239.

[284] Adults spent 46.5 percent of their total leisure time watching television in 1970 and 46.1 percent in 2000. Harold L Vogel, ENT. INDUS. ECON A GUIDE FOR FINANCIAL ANALYSIS (5th Ed) at 9. The 46.1 percent statistic includes time spent watching network affiliates, independent stations, basic cable programs and pay cable programs. It does not include non-delivered video such as movie theaters, video tapes, and video games.

[285] Our most recent Annual Video Competition Report found that 85.25% of all U.S. television households subscribe to an MVPD *See 2002 Video Competition Report,* 17 FCC Rcd 26901 at Appendix B, Table B-1.

[286] The analytical approach of the *DOJ/FTC Merger Guidelines* "begins with a focus on consumers. Whether a proposed merger or acquisition is anticompetitive is determined in part by asking what alternatives are, or would be, available to customers in the event that prices increase or service deteriorates " Fox Comments, Owen Statement at 2-3

DMA should be included as participants in the market for DVP.

144 The programming quality delivered to the minority of households that do not subscribe to cable or DBS is protected by the majority of households that do subscribe. Although non-subscribing households have fewer program choices than subscribing households, broadcasters cannot reduce the viewer appeal of their programming to non-subscribing households, without also reducing the viewer appeal of their programming to subscribing households. Broadcasters deliver the same programming to both subscribing and non-subscribing households. Thus, the majority of households that subscribe to cable or DBS assure that non-subscribing households receive appealing programming.

145 Although viewers easily switch between the programming offered by broadcast television stations and the programming offered by cable networks, broadcast television stations and cable networks may respond differently to changes in local market concentration. Therefore, in formulating our revised local broadcast television ownership rules, we continue to draw a distinction between television broadcast stations and cable networks. Because cable networks typically offer national programming nationwide, they have incentives to respond to conditions in the national market. It is unlikely that mergers between broadcast television stations in any local market would alter the competitive strategy of a national cable network. In contrast, local broadcast television stations offer a mix of national programming and local programming in a geographic area typically no larger than a DMA. As such, local broadcast television stations have incentives to respond to conditions in local markets. It is the unilateral and coordinated responses of local broadcast television stations to mergers between local broadcast television stations that may result in potential competitive harms. Thus, we focus on ownership of television broadcast stations, not cable networks, to promote competition in local television markets.

**(a) Geographic Market for DVP**

146. As we evaluate the competitive effects of mergers between local broadcast television stations, we must define the relevant geographic market for the DVP market. Generally, cable systems carry all the broadcast stations assigned to the DMA in which they are located, pursuant to our must-carry/retransmission consent requirements.[287] Cable systems providing service to the majority of households also carry most major cable networks. As such, the relevant geographic market for DVP is the DMA for most mergers between local broadcast television stations.

**(b) Efficiencies of Common Ownership of Television Broadcast Stations in DVP Markets**

147 We recognize that common ownership of stations may result in consumer welfare enhancing efficiencies. First, common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings.[288] Joint operations can eliminate redundant studio and office space, equipment, and personnel, and increase opportunities for cross-promotion and counter-

[287] *See* 47 C.F.R. § 76.55(b)-(e) (defining local noncommercial educational television station, local commercial television station and television market for purposes of signal carriage obligations); 47 C.F.R § 76.56 (signal carriage obligations).

[288] Randy Falco, President of NBC Television Network, argues that broadcasters have large sunk costs in programming and ownership of multiple stations at the local level enables broadcasters to amortize programming costs across more platforms Bear Stearns Comments at 208-09.

programming.[289] Our current rule hinders the realization of efficiencies by prohibiting common ownership of television stations in most DMAs. To enhance the ability of broadcast television to compete with cable and DBS in more DMAs, we believe that the potential efficiencies and cost savings of multiple station ownership should be available to stations in a larger number of DMAs than permitted by our current rule [290]

148. Common ownership of broadcast television stations in a local market may also spur the transition to digital television The DTV transition is a government-mandated undertaking designed to achieve several important goals, including: (1) the preservation of free, universally available local broadcast television in a digital world, and (2) the promotion of spectrum efficiency and the rapid recovery of spectrum for other uses.[291] In developing DTV build-out rules for broadcast stations, the Commission has recognized the particular financial challenges faced by stations in smaller markets.[292] Nevertheless, many DTV construction costs do not vary with market size and thus it still may be relatively more difficult for stations in these markets to finance the transition to DTV.[293]

149. We believe that our modified rule, which permits the common ownership of at least two television stations in most markets, will have a beneficial impact on the DTV transition. One study shows that stations that are commonly owned and stations involved in joint operating arrangements are further along in the DTV transition.[294] Common ownership could facilitate cost savings by sharing DTV equipment (e.g , towers, production equipment) and engineering personnel. Common ownership would also allow the expertise gained in transitioning one station to DTV to be transferred to other commonly owned stations.

150. Our competition goal seeks to ensure that for each television market, numerous strong rivals are actively engaged in competition for viewing audiences. Although mergers among participants in the DVP market would not affect the number of delivered video program streams, they might adversely affect the types or characteristics of the programming offered by the merged entities to the detriment of viewers. Audience share data, however, reveals that common ownership of two broadcast television

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[289] Sinclair Comments at 16, Exhibit 8 at 30-31.

[290] Alaska Comments at 3-4. Alaska contends that the current rule gives relief to large market broadcasters but denies the benefits of common ownership to small market broadcasters. *See also*, Granite Comments at 14; Gray Comments at 17, and Nexstar Comments at 20-22

[291] *See, e g , Advanced Television Systems and Their Impact Upon the Existing Broadcast Service,* 12 FCC Rcd 12809, 12811-12 ¶¶ 5-6 (1997) ("*Fifth Report and Order*").

[292] *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television,* 16 FCC Rcd 20594 (2001) (permitting stations in markets beyond the top thirty markets initially to come on the air with lower-powered – and therefore less expensive – facilities, to operate at a reduced schedule, and to file for extensions of time to construct based on financial hardship); *Fifth Report and Order,* 12 FCC Rcd at 12842 ¶ 78 (adopting staggered construction schedule to help reduce costs for smaller market stations and permit them to learn from the experience of stations in larger markets)

[293] Media General *et al* Comments at 5.

[294] Coalition Broadcasters Comments, Appendix B, *Study of DTV Rollout by Smaller Stations in Markets 51-100.*

stations has generally improved audience ratings.[295] That is, the evidence we have for common ownership of two television stations suggests that more viewers prefer the post-merger programming. We therefore conclude that our current rule, which prohibits common ownership of broadcast television stations in most markets, is overly restrictive. Because some relaxation of the current rule to permit additional consolidation in local television markets would facilitate efficiencies and likely result in the delivery of programming preferred by viewers, we conclude that our current rule cannot be justified on grounds of competition in the market for DVP.

#### (ii) Video Advertising Market

151 We conclude that the current rule is not necessary to promote competition in the video advertising market. We are concerned with competition in the broadcast television advertising market only to the extent that it adds an extra level of protection to viewers and enables broadcasters to compete for advertising revenue. We conclude that our local TV ownership rule restricts many broadcasters to suboptimal size and, therefore, hinders their ability to compete with other media for advertising revenue. That said, competitive broadcast television advertising markets may require a larger number of owners of DVP than are necessary to protect competition in the DVP market. As such, assuring competition in video advertising markets may provide the public with an added level of protection. A larger number of television station owners in a local television market may also lower the potential for the exercise of market power by any one broadcaster and, therefore, help smaller or non-consolidating broadcasters compete for advertising revenue.

152. We have determined that broadcast television advertising is a relevant product market. Advertisers differ in their ability to substitute between alternative media. Although some advertisers that use broadcast television stations may consider cable networks or the advertising time sold by local cable operators to be good substitutes, other advertisers may not consider these alternatives to be good substitutes.[296] In addition, most advertisers that use broadcast television stations do not consider radio, newspapers, and other non-video delivery media to be good substitutes.[297] We disagree with studies

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[295] *Id*, Attachment A: *Television Local Marketing Agreement and Local Duopolies: Do They Generate New Competition and Diversity?* Mark R. Fratrik, BIA Financial Network (Jan. 2003). Fratrik evaluated the performance of LMA or co-ownership operations involving LIN Television and Raycom Media, and other local television stations in seven markets and determined that in all markets, these arrangements led to significant increases in both audience share and advertising revenue.

[296] David Barrett, President and Chief Executive Officer of Hearst-Argyle Television, Inc , argues that over-the-air television stations have the most popular programs and can aggregate the largest audience. When it comes to attracting advertisers, Mr. Barrett maintains that broadcast television stations have absolute advantages over niche boutique cable network offerings Bear Stearns Comments at 26.

[297] MOWG Study No. 10, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* by Anthony C. Bush (Sept. 2002) ("MOWG Study No. 10") (finding weak substitutability between local television and local radio and weak substitutability between local television and local newspapers); Fox Comments, Owen Statement at 12 (asserting that merger enforcement in the media has tended to focus on rather narrow advertising markets, that DOJ excludes television and newspaper advertising as alternatives to radio when considering the advertising market definition in radio station mergers, and that DOJ has similarly rejected television and radio advertising as alternatives for newspaper advertisers when considering newspaper mergers); IPI Comments, Appendix A (finding no responsiveness of local cable television advertising rates to changes in local broadcast television advertising rates) The findings of IPI's study suggest that cable may have market power over some local advertisers IPI's study does not, however, address the issue of whether consolidation of broadcast (continued )

suggesting that broadcast television is not a relevant product market.[298] A critical failing of these studies is the assumption that any exercise of market power would result in a general and uniform price increase to all advertisers. These studies argue that a significant number of advertisers have good substitutes for broadcast television and could defeat a general and uniform price increase. These studies fail to recognize that media markets are characterized by repeated interaction that enables broadcasters to identify advertisers that have good substitutes for broadcast television and those that do not have good substitutes for broadcast television. With this information, the exercise of market power in broadcast television markets would result in targeted and non-uniform price increases to those advertisers that do not have good substitutes for broadcast television, without raising prices for those advertisers that do have good substitutes for broadcast television.[299]

153. Our experience suggests, however, that common ownership of two local broadcast television stations has produced efficiencies without facilitating the exercise of market power in the broadcast television advertising market. Two studies in the record evaluate the impact of consolidation on advertising prices One study indicates that local broadcast advertising prices are not significantly higher for stations owned or operated by single entity.[300] Another study examines market structure in the Columbus, Ohio, DMA following a broadcast television local marketing agreement ("LMA")[301] combination in the market and concludes that the LMA is unlikely to result in any competitive harm to local advertisers.[302] The data for these studies were based on the common operation of two broadcast

(Continued from previous page)

television stations in a local market could have market power *See also* Bear Steams Comments at 88-89 (Jeff Smulyan, Chairman, Emmis Corporation asserts that the audience most targeted by advertisers (18 to 34 year-olds and 18 to 49-year olds) are not reading daily newspapers anymore, which gives broadcast television an advantage).

[298] Crandall contends that his results suggest that television broadcast is not its own product market. Sinclair Comments, Exhibit 1, *The Economic Impact of Providing Service to Multiple Local Broadcast Stations Within a Single Geographic Market*, Robert W Crandall, at 23 ("Sinclair Comments, Crandall Statement"). Baumann and McAnneny contend that the relevant product market is broader than broadcast television advertising and includes cable television, radio, newspaper, outdoor, and direct mail. Sinclair Comments, Exhibit 8, *Analysis of the Competitive Effects of an LMA between WTTE-TB and WSYX-TV in Columbus, Ohio*, Michael G. Baumann and Joseph W. McAnneny (Aug. 28, 1997) at 20 ("Sinclair Comments, Baumann/McAnneny Statement")

[299] Sinclair Comments, Baumann/McAnneny Statement at 28-30 Baumann and McAnneny maintain that price discrimination is unlikely because (1) broadcasters would have to make educated guesses to identify price-insensitive advertisers, (2) advertisers that consider broadcast television an essential outlet have an incentive to disguise their preferences, and (3) advertisers could use media buyers and advertising agency representatives that are able to compare rates and resist attempts to charge greatly disparate rates for similar spots. *Id.* Baumann and McAnneny do not explain how hiring an advertising agency prevents price discrimination. We are not persuaded. Broadcasters make repeated sales, have a keen understanding of the price-sensitivities of advertisers, and can identify advertisers that consider television an essential buy. We conclude that a broadcaster with market power could raise prices to these advertisers

[300] Sinclair Comments, Crandall Statement at 27 Using data from Sinclair, Crandall performs an econometric analysis of 58 stations in 38 DMAs.

[301] An LMA or a time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming. *See Local TV Ownership Report and Order*, 14 FCC Rcd at 12958 ¶ 126, 47 C F R § 73 3555, Note 2(j) (2002)

[302] Sinclair Comments, Baumann/McAnneny Statement at 2.

television stations in the same market. In light of this evidence, and evidence cited above that the current rule prohibits some consumer welfare enhancing combinations, we conclude that the current rule is overly restrictive and not necessary to protect competition in the broadcast television advertising market.

**(iii) Video Program Production Market**

154 We conclude that the current rule is not needed to protect competition in the video program production market. Broadcast television stations, along with TV networks, cable networks, program syndicators, and cable and DBS operators purchase or barter for video programming. The channel capacity of today's cable operators and DBS operators provides many more opportunities for sellers of existing and new video programming, compared with 20 years ago.[303] Many of the programs sold today are specifically targeted to the niche audiences available on cable networks. In addition, many video programs initially sold to TV networks migrate to cable networks, and a few programs initially sold to cable networks migrate to local broadcast television stations. Same-market combinations are only of concern to the few program syndicators that sell their programming directly to individual local television stations. These program syndicators would not consider sales to group owners of television stations in multiple markets, TV networks, and cable networks to be good substitutes for the sale of programming to individual stations These program syndicators play one television broadcast station against another in the same market to sell their programming By precluding common ownership of broadcast television stations in most markets, our current rule provides for more owners of television broadcast stations in most markets than are necessary to assure that program syndicators receive a fair price for their programming.[304] We conclude, therefore, that the current rule is not necessary to protect competition in the video program production market.

**b. Localism**

155. The adoption of the local TV ownership rule was not predicated on promoting localism. To the contrary, the Commission has previously recognized that relaxation of the rule was likely to promote localism Specifically, we relaxed the local TV ownership rule in 1999 on grounds that local ownership combinations were likely to yield efficiencies that "can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public interest."[305] The primary evidence of "programming and service" benefits was anecdotal evidence of increases in the amount of local news and public affairs programming aired by stations participating in LMAs [306]

156. The *Notice* requested comment on whether and how the local TV ownership rule affects localism.[307] We asked whether the rule affects the quantity or quality of local news and other programming of local interest produced and aired by local stations, and whether it affects the local

[303] *See supra* ¶¶ 106-128

[304] The current rule ensures that there are at least eight independent owners in all markets with eight or more stations.

[305] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12920 ¶ 34.

[306] *Id.* at 12921-22 ¶ 36, n 68 Most of the record evidence of the potential benefits was anecdotal and was presented by broadcasters based on their own experiences with LMAs

[307] *Notice*, 17 FCC Rcd at 18535 ¶ 95.

selection of news content that is aired[308] We sought empirical data on the impact that common ownership and operation has had on the production of local programming by stations involved in such combinations or arrangements, and data on the quality of such programming.[309] We also sought comment on the costs of producing local news and public affairs programming, and the relationship of our local TV ownership rule to the viability of such programming.[310] Below, we analyze the relationship of the current rule to our policy goal of promoting localism, and examine whether modification of the rule will advance this policy goal. We conclude that our current local TV ownership rule poses a potential threat to local programming, and that modification of the rule is likely to result in efficiencies that will better enable local television stations to acquire content desired by their local audiences.

#### (i) Local Programming Quantity and Quality

157 Commenters advocating relaxation of the local TV ownership rule contend that if the current rule has any relationship to localism, it is to hinder the achievement of this policy goal.[311] According to these commenters, the current financial position of many television broadcasters and the high cost of producing local news and public affairs programming threatens existing local programming and precludes development of new programming[312] These commenters contend that the current rule prohibits combinations that would result in efficiencies which would facilitate production of more local news and public affairs programming, or at least protect current local news operations.[313] In support of these arguments, commenters provide persuasive anecdotal and empirical evidence of how LMA and duopoly combinations have improved local coverage,[314] and some evidence of the rising costs of local news operations.[315]

158 On the other hand, commenters opposing modification of the rule assert that concentration

[308] *Id*

[309] *Id* at 18535 ¶ 95-96

[310] *Id* at 18535 ¶ 97.

[311] Sinclair Comments at 29-31; Media General *et al* Comments at 5, Duhamel Comments at 5-6. Several commenters state that our localism policy is unrelated to ownership rules They contend that localism is an obligation of all broadcast licensees that is enforced through our licensing and license renewal processes *See* Nexstar Comments at 18-20, Gray Comments at 16, Sinclair Comments at 30-31.

[312] Alaska Comments at 6; Belo Comments at 25; Coalition Broadcasters Comments at 4-7; Granite Comments at 6-7; Gray Comments at 16-18; NAB Comments at 75-77.

[313] Alaska Comments at 5-6; Coalition Broadcasters Comments at 4, Duhamel Comments at 6; Granite Comments at 7, Gray Comments at 15-16; Hearst-Argyle Comments at 8-9, Media General, *et al* Comments at 5; NAB Comments at 78.

[314] Belo Comments at 22-24, Coalition Broadcasters Comments at 16-33; Fox Comments, Economic Study B, *Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality* (*"Fox News Study"*); Nexstar Comments at 2-6

[315] NAB Comments, Attachment D, *Newsroom Budgets in Midsize and Small Markets*, prepared for NAB by Smith Geiger, LLC (*"NAB Newsroom Costs Study"*); NAB Comments, Attachment C, *The Declining Financial Position of Television Stations in Small and Medium Markets* ("NAB Comments, Small to Medium Markets Statement")

within local markets impedes localism, as evidenced by sharing of news resources and one case of reduced local news offerings following the establishment of a same-market television combination Some of these commenters anticipate that modification of the local television ownership rule will lead to television programming that is less responsive to local needs based on their observations of how radio consolidation has affected local programming.[316] In support of their contentions, these commenters provide examples of how combinations have harmed local news and public affairs programming.[317] The few examples provided, however—especially those that are borrowed from the newspaper or radio contexts—do not persuade us that local combinations of television stations will harm localism.

**(a) Empirical Evidence**

159 An empirical study of the effects of common ownership or operation on local news quantity and quality provides some evidence that stations that are commonly owned or operated are more likely to offer local news than independently owned stations. The study submitted by Fox ("News Study") examined the news offerings of all full-power commercial television broadcast stations, comparing the quantity and quality of local news offerings of stations that are part of a commonly owned/operated pair with those of other stations [318] The News Study found that stations that are part of a commonly owned local station group or LMA are significantly more likely to carry local news than other stations, even controlling for other factors The study also found that the total minutes of local news carried by commonly owned or operated stations is similar to the total minutes of local news carried by other stations, as is the quality of the news programming as measured by the number of news awards the stations receive. The study considered whether stations that compete with same-market combinations increase or reduce the amount of local news they air in response to the presence of the same-market combination, and found that the presence of a combination had no statistically significant effect on the amount or quality of news programming available in the DMA, after controlling for other factors.[319]

**(b) Anecdotal Evidence**

160 Broadcasters provide persuasive anecdotal evidence in support of their claims that same-market combinations have resulted in efficiencies that produce public interest benefits. Belo states that its acquisition of a second station in the Seattle, Washington, DMA has resulted in an extra hour of news programming,[320] and has allowed Belo to devote more resources to public affairs programming.[321] Belo's

[316] AFL-CIO Comments at 27-30, AFTRA Comments at 12-14, 33-35; CFA Comments at 250-260, CWA Comments at 29, 32, 40-42; UCC Comments at 16, 51-52.

[317] Although they offered anecdotal evidence, commenters who urge us to retain the current rule did not provide empirical data concerning the effects of same-market local TV combinations on local news and public affairs programming PEJ provided an empirical study that analyzed the effects on local news of the following factors: size of a station group (*i e* , across all markets), network affiliation, cross-ownership of other media, or ownership by an entity with corporate headquarters in the market. Thus, the study did not analyze the effects on local news of common ownership of more than one television station in a market.

[318] *Fox News Study* at 3.

[319] *Id* at 2

[320] Belo Comments at 22-23 The stations share news staff but have separate news producers

[321] *Id*

second station in Spokane, Washington, recently began airing local news,[322] and a recently acquired second station in Tucson, Arizona, will soon begin to air a local newscast.[323] Nexstar states that local news and public affairs programming has increased as a result of its LMAs in various markets,[324] including, for example, tripling the news coverage in Bloomington, Illinois, from one crew to three crews,[325] starting the market's only 9:00 PM newscast;[326] reinstating local sports programming;[327] and producing and airing a new local public affairs program.[328]

161. Coalition Broadcasters point to similar public interest benefits resulting from their same-market combinations.[329] At one station that is part of an LMA, efficiencies allowed for an increase in the number of employees devoted to producing news and the expansion of the station's local news from six hours per week in 1994 to 19.5 hours per week today.[330] Another station did not offer any regular local news or sports coverage and provided little other local program service prior to entering into an LMA, which later became a duopoly.[331] Today, the station broadcasts approximately 120 local university sports events annually, 60-second news briefs twice daily, five minute news briefs during university games, and a rebroadcast of the news of its LMA partner at a different hour.[332] The station also has aired 21 locally-produced evening specials over the past two years.[333] Operating independently, the local programming offerings of two UHF stations in Cleveland, Ohio, were scant – one hour of local news on one of the stations, and no local news on the other.[334] The stations then entered into an LMA and later became a duopoly.[335] Today, one station airs 7.5 hours of local news coverage every weekday, and the other offers

[322] *Id* at 23. Although the news is co-produced with its duopoly pair, the station airs its news at a different time and has its own anchor and news producer. *Id*

[323] *Id*

[324] Nexstar Comments at Appendix A (describing public interest benefits resulting from combinations in nine markets)

[325] *Id* at A-1

[326] *Id* (describing changes resulting from an LMA in the Peoria-Bloomington, Illinois DMA)

[327] *Id* (describing changes resulting from an LMA in the Joplin, Missouri-Pittsburg, Kansas DMA)

[328] *Id* at A-2 (describing changes resulting from an LMA in the Wilkes Barre-Scranton, Pennsylvania DMA)

[329] Coalition Broadcasters Comments at 16-34 (describing public interest benefits resulting from seven combinations).

[330] *Id.* at 16 (describing an LMA in the Fort Myers-Naples, Florida DMA).

[331] *Id* at 18 (describing a combination in the Honolulu, Hawaii DMA).

[332] *Id* at 18-20.

[333] *Id.*

[334] *Id* at 21

[335] *Id.*

one hour of news per day, as well as news breaks.[336] Fox reports that the 1999 relaxation of the local TV ownership rule allowed it to create nine combinations, which are airing an average of 6% more local news than before Fox acquired these stations.[337]

162 In support of their contention that relaxation of the local TV ownership rule has adversely affected localism, AFL-CIO and AFTRA state that "examples of the loss of local newscasts . . . as a result of media consolidation abound nationwide" but provide only three examples, two of which concern radio combinations.[338] Specifically, they state that Sinclair has announced plans to cease local production of weather reports at its two television broadcast stations in the Dayton, Ohio, DMA which now will air weather reports generated at Sinclair's Baltimore, Maryland, headquarters.[339] As these commenters recognize, Sinclair stations that are not part of combinations also will receive weather reports from corporate headquarters, so this evidence does not demonstrate that consolidation within local markets decreases local origination of weather reports or otherwise reduces local programming.[340] Rather, production of programming at a national headquarters appears to be motivated by the ability to achieve efficiencies unrelated to the number of stations Sinclair owns within a particular local market.[341] AFL-CIO and AFTRA also state that when Viacom acquired a second all-news radio station in Chicago, it shut down one of the stations, eliminating a source of local news [342] Viacom refutes this claim, asserting that the station was not "shut down" but that its format was changed from all news to sports/talk in order to meet the desires of local audiences.[343] We do not agree that a change in format is the same as "shutting down" a station. We also do not agree that a single example of a radio station's format change can be extrapolated into a general statement about the effects of our existing local TV rule, or a predictive statement about the likely result of modifying the rule.

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[336] *Id* Both stations have access to significantly improved resources and facilities for news production Prior to the combination, the station offering news had seven videographers, 25 other staff, and a single news truck. Today, the stations boast a combined news division of 19 videographers, 73 other staff, four news trucks, sixteen cars, a helicopter, six ENG microwaves and five receive sites *Id* at 21-34 (describing similar public interest benefits resulting from combinations in several other markets); *See also* Statement of Edward Munson, Vice President and General Manager of WAVY(TV) and WVBT(TV) at FCC Field Hearing on Media Ownership, Feb 27, 2002 ("LIN En Banc Statement") (describing similar public interest benefits resulting from a combination in the Richmond, Virginia DMA)

[337] Fox Comments, News Programming Exhibit 1 at 3-4 Fox states that in each case, it has owned the second station for 16 months or less *Id*

[338] AFL-CIO Comments at 47-49, AFTRA Comments ¶¶ 32-40

[339] AFL-CIO Comments at 48, AFTRA Comments ¶¶ 32-40

[340] Sinclair Reply Comments at 12 (as evidenced by its use of NewsCentral in markets in which it owns only one station, Sinclair's NewsCentral initiative has "nothing to do with duopoly").

[341] Sinclair states that its NewsCentral initiative, pursuant to which it produces news from a central location, is "intended to allow Sinclair to produce and broadcast news in a more efficient manner than is currently the case," and is not relevant to the instant proceeding. *Id.* at 6

[342] AFL-CIO Comments at 48-49, AFTRA Comments ¶¶ 32-40

[343] Viacom Reply Comments at 5-6

163 UCC believes that the increased common ownership of stations in the same market has reduced the amount of local programming because co-owned stations consolidate staff and resources that produce local information.[344] UCC complains that, as a result of the 1999 relaxation of the local TV ownership rule, there are now at least 75 commonly owned station pairs and 20 station pairs that are part of LMAs.[345] UCC provides examples of two markets where commonly owned stations share resources,[346] and one market where a combination that once shared news resources ceased to produce local news entirely, relying on news produced by another station in the market.[347] The effects of same-market combinations on news production in just three markets are not a sufficient basis for a conclusion about the effects of some 95 same-market combinations on localism. Moreover, although the examples provided show that the subject stations no longer produce news independently, this does not necessarily translate into "less" local news.[348] The subject stations may now offer the same news at different times, which might actually expand the "amount" of news available to viewers in that market, if viewers previously unable to watch news programming can watch the news at a different time.[349] By combining resources, the subject stations may also be offering more coverage of local events than before UCC's anecdotal evidence does not address these factors

#### (c) Conclusion

164. On balance, evidence presented by commenters concerning the amount and quality of local news and public affairs programming suggests that owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do Thus, modifications to the rule that will allow for greater common ownership are likely to advance our localism goal.

### (ii) Effect of Local Market Consolidation on Local Control Over Content

165. Without linking their conclusions to a specific rule, AFL-CIO and AFTRA contend that media consolidation generally reduces local control over content and places greater control in the hands of the corporate headquarters of the entity that owns a given outlet.[350] They further state that by reducing

[344] UCC Comments at 39-40

[345] *Id*

[346] *Id* at 40 (discussing the combined operations of two stations owned by Viacom in New York, New York and two stations owned by Fox in Los Angeles, California)

[347] *Id* (describing a Detroit, Michigan combination owned by Viacom that now obtains news from a competitor).

[348] The production of local news by more owners relates to viewpoint diversity, not localism.

[349] According to Belo, broadcasters owning or operating same-market combinations have "strong economic incentives" to add news programming to commonly owned stations. At a minimum, such broadcasters would repurpose newscasts at staggered times to increase audience share, thereby bringing local audiences more viewing opportunities Belo Comments at 24-25 Coalition Broadcasters assert that "even the limited consolidation achieved through existing LMAs and duopolies has enabled in-market stations to offer beneficial services such as local news and public affairs programming and other innovative services " *See* Coalition Broadcasters Comments at 6-7

[350] AFL-CIO Comments at 51-53; AFTRA Comments ¶¶ 46-51.

the number of available employers at the local level, consolidation makes news professionals less likely to risk alienating their employers by challenging their demands.[351] In support of this, AFL-CIO and AFTRA cite their own experience in contract negotiations, which they contend are conducted by corporate, not local station representatives. They do not, however, provide any examples of negotiations, nor do they offer a comparison between negotiations with employers that own more than one station in a market and those that own single stations.[352] They state that because of a directive from a Disney CEO, the ABC network cancelled a story on Disney's hiring policies.[353] However, this example does not pertain to programming decisions of local stations, but to the programming decision of a national broadcast network Such evidence may be relevant to whether there is a tie between ownership and the presentation of viewpoints, but does not establish a connection between local market structure and local control over content. Indeed, we have no record evidence linking relaxation of our local ownership rule to a reduction in local control over content[354] We also have no means of measuring the extent to which news professionals' fear of retribution by their employers is reducing the ability of television broadcast stations to offer news focused on the needs and interests of their local communities, nor can we connect such concerns to our local ownership rules.

### (iii) News Programming Costs and Viability of Local News Operations

166. Several commenters contend that the rising cost of producing news and public affairs programming is forcing broadcasters to reduce news production and that relaxation of the local TV ownership rule would allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing programming.[355] Gray provides four examples of stations in smaller markets that have shut down or significantly scaled back their news operations due to financial concerns.[356]

167 NAB filed a study conducted by Smith Geiger, LLC ("Smith Geiger") examining the cost of the startup and operating costs of local news production for stations in small (ranked 101-210) and mid-sized (ranked 51-100) markets.[357] The study provides an average operating budget and the average

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[351] AFL-CIO Comments at 53; AFTRA Comments ¶ 52 They also cite a recent study showing that 41% of 300 reporters surveyed said that they had intentionally avoided newsworthy stories to benefit the corporate interests of their news organizations AFL-CIO Comments at 52; AFTRA Comments ¶ 50 (citing Pew Research Center for People and the Press Survey (Apr 30, 2002)). Again, such comments and findings help to establish a connection between viewpoint diversity and ownership, but they do not tell us whether the local TV ownership rule is in any way linked to journalists' reporting decisions Commenters do not contend, nor does the cited survey find, that such results are any more or less likely in when there is greater local market concentration.

[352] AFL-CIO Comments at 51-52, AFTRA Comments ¶ 47.

[353] AFL-CIO Comments at 52; AFTRA Comments ¶ 48

[354] Nexstar asserts that, contrary to the unsubstantiated claims of some commenters, they "actively mandate a local community focus for their stations." Nexstar Reply Comments at 6.

[355] Gray Comments at 17-19, Duhamel Comments at 5-6; Granite Comments at 6-7, 11-12; NAB Comments at 75-78; Nexstar Reply Comments at 11-12

[356] Gray Comments at 18-19. Similarly, Granite contends that "local" news is not so local anymore because financial pressures have forced broadcasters to take cost-cutting measures such as filling local newscasts with regional and national feeds. Granite Comments at 7

[357] *NAB Newsroom Costs Study*, *supra* note 318.

startup costs for a small market station and for a mid-size market station, intended to reflect newsrooms that are neither "heavily invested" nor "financially starved."[358] The study finds that although equipment prices are dropping rapidly, rising demand for qualified personnel is increasing the amount stations must spend on salary and benefits.[359] Smith Geiger concludes that a startup news operation would not "break even" until year 13 in a small market and year 14 in a mid-sized market.[360] The study concludes that in this climate, if a local station were to cease news operations, "it is difficult to imagine another entity stepping in to take its place."[361] Smith Geiger notes that although news operations earn a profit,[362] they require the parent company or station to carry a significant cost load and deal with other intangibles such as personnel management, liability, and community goodwill.[363] Smith Geiger concludes that this may lead local stations to exit the local news business in favor of lower cost alternatives, such as acquired programming, which it estimates will earn a higher profit in both small and mid-sized markets.[364] Smith Geiger ultimately concludes that "the continuing profitability of a local television news operation is now highly uncertain."[365] Many commenters agree.[366] NAB submitted an additional study which compares the average cost of producing news by affiliates of "Big Four" networks (*i.e.*, ABC, CBS, Fox, and NBC) in markets of various sizes[367] These data show that the average news expense of affiliate stations has increased by as much as 104% between 1993 and 2001.[368]

168 Smith Geiger does not provide detailed information on how it gathered its data, how many stations were sampled, or how the stations were selected. The study data may have been gathered from hundreds of stations or a mere handful. However, NAB's other study concerning the costs of producing news, which describes its methodology and surveys a broad range of stations, supports the conclusion that news costs are rising. Moreover, there is no contrary evidence in the record to suggest that the cost of producing news and public affairs programming is decreasing. We also recognize that certain factors,

[358] To determine the costs, Smith Geiger states that it polled multiple stations in each market range, but it does not specify how many stations were polled, how the stations were selected, or its polling methodology *Id.* at 2

[359] *Id*

[360] *Id.* at 6, 11

[361] *Id* at 15

[362] Smith Geiger finds that existing news operations in mid-sized markets earn a 40% profit margin, and that news operations in small markets earn a 30% profit margin. *Id* at 13.

[363] *Id.*

[364] *Id* at 13-15

[365] *Id* at 2

[366] Alaska Comments at 5-6, Bear Stearns Comments at 5; Gray Comments at 16-19, Granite Comments at 12-14; NAB Comments at 75-78.

[367] NAB Comments, Small to Medium Markets Statement, *supra* note 318.

[368] *Id* Specifically, the study shows that between 1993 and 2001, the average increase for stations in markets 51-75 was 71%, in markets 76-100, 104%, in markets 101-125, 58%, in markets 126-150, 56%; and in markets 151-175, 82%

such as declines in network compensation[369] and the costs of transitioning to DTV,[370] are likely to place some broadcasters under financial pressures which could cause them to choose a less expensive option than producing their own local programming.

169 *Conclusion* The current local TV ownership rule is not necessary in the public interest to promote localism More likely, the current rule is hindering our efforts to promote localism. Anecdotal and empirical evidence in the record demonstrates post-combination increases in the amount of local news and public affairs programming offered by commonly owned stations. Moreover, rising news production costs and other factors may cause broadcasters to turn to less costly programming options. Having found that there is a positive correlation between same-market combinations and the offering of local news, we agree with NAB and others who contend that modifying the local TV rule is likely to yield efficiencies that will allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing local programming.

**c. Diversity**

170 Section 202(h) requires that we consider whether the local TV ownership rule is necessary in the public interest to promote our diversity goal. Our current rule measures viewpoint diversity largely through its voice test, which ensures that all television markets have at least eight independent broadcast television voices. The *Sinclair* court remanded the Commission's decision in the *Local TV Ownership Report and Order* on grounds that we failed to adequately explain why only television broadcast stations are relevant to our diversity analysis for purposes of our local TV rule, when several other kinds of media were deemed relevant to our diversity analysis for purposes of other rules. Accordingly, we also sought comment on whether additional media should be considered in evaluating diversity in local television markets. The *Notice* also sought comment on the extent to which local television stations express viewpoints, and whether there is a connection between ownership and viewpoint.

171. As discussed in the Policy Goals Section, we find that, as we have previously held, multiple media owners are more likely to present divergent viewpoints.[371] Upon review of the record in this proceeding as well as our own analysis of local media markets, we find that media other than television broadcast stations contribute to viewpoint diversity in local markets. The data in the record indicate that the majority of markets have an abundance of viewpoint diversity. We conclude therefore that our existing local TV ownership rule is not necessary to achieve our diversity goal. In order to promote viewpoint diversity, we will rely on a combination of our cross media limits, discussed below at Section VI D., as well as revised local television and local radio ownership caps.

172. Although our local TV ownership rule was not intended to promote program diversity, our *Notice* also sought comment on the relationship between our local TV ownership rule and program diversity. We also conclude that the current rule is not necessary to promote program diversity.

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[369] Alaska Comments at 5-6, Granite Comments at 12; NAB Comments at 74.

[370] Alaska Comments at 5-6, Bear Stearns En Banc Statement at 3; Gray Comments at 18; Granite Comments at 12; NAB Comments at 72-75 *See also* ¶¶ 148-149, *supra*

[371] *See* Policy Goals, Section III, *supra*

### (i) Viewpoint Diversity

173 Proponents of relaxing the rule contend that owners of television stations do not present their own viewpoints,[372] that each television station presents multiple viewpoints,[373] that a single owner of more than one television station in a market has greater economic incentives to present a broader diversity of viewpoints in order to attract more viewers,[374] and that under the current rule, television stations avoid presenting extreme views in order to avoid alienating viewers.[375] Several commenters contend that the current rule actually poses a threat to viewpoint diversity.[376] Duhamel asserts that in today's economic climate, if broadcasters cannot consolidate within local markets, stations will go dark, resulting in greatest possible harm to diversity.[377]

174. We recognize that a single media owner may elect to present a range of different perspectives on a particular political or social issue. It may also be accurate that, as several commenters contend, a single owner of multiple media outlets in a local market may have a greater incentive to appeal to more viewers by presenting more perspectives than do multiple owners of single outlets. Even if a single owner of multiple television stations in the same market has an enhanced ability and incentive to present a broader range of viewpoints, that single owner still retains "ultimate control over programming content, who is hired to make programming decisions, what news stories are covered, and how they are covered."[378] We conclude that we cannot rely exclusively on the economic incentives that may or may not be created by ownership of multiple television stations to ensure viewpoint diversity. However, as we discuss further below, because we find that other media contribute to viewpoint diversity in local markets, we conclude that our existing local TV ownership rule is not necessary to achieve our diversity goal.

175. *Contribution of Other Media to Viewpoint Diversity in Local Markets.* The local television ownership rule has traditionally focused only on the contribution of television broadcast stations to diversity in local markets. In the 1998 Biennial Review proceeding, the Commission sought

[372] Belo Comments at 14-16, 17-19, Duhamel Comments at 7, Granite Comments at 10-11, Sinclair Comments at 50-52, Exhibit 24, Belo Reply Comments at 3-5

[373] Granite contends that every station presents multiple viewpoints, citing, among other things, political broadcasting requirements that ensure that stations serve "as a megaphone for all candidates, not just those with whom the broadcaster agrees " Granite Comments at 10-11. *See also* Statement of Jay Ireland, President, NBC Stations at FCC Field Hearing on Media Ownership (Feb. 27, 2003)at 4 ("NBC En Banc Statement").

[374] Fox Comments at 51-52 (a single owner of multiple outlets has a greater incentive to provide viewpoint diversity than would multiple owners), NAB Comments at 32-35; Nexstar Comments at 8-9 (viewpoint diversity will not be reduced but increased, as demonstrated by the maintenance of separate news staffs and different news content by LMA combinations operated by Nexstar and Quorum); Paxson Comments at 7-8; 28 (market forces will promote diversity goals), Sinclair Comments at 26-28, Exhibit 16 (common ownership or operation has increased viewpoint diversity in some cases, as evidenced by certain Sinclair duopolies/LMAs).

[375] Granite Comments at 10-11; Belo Comments at 14-16.

[376] Duhamel Comments at 7. *See also* Coalition Broadcasters at 6 (combinations promote diversity by ensuring the viability of local broadcasters that might otherwise go dark).

[377] Duhamel Comments at 7

[378] UCC Comments at 3-4. *See also* CWA Comments at 28-32, 42-45.

comment on media substitutability, but was "unable to conclude from the record the extent to which other media serve as readily available substitutes for broadcast television." Lacking adequate factual information concerning the contribution of other media to competition and diversity in local markets, the Commission established a voice test that included only full power television broadcast stations.

176 The *Notice* sought comment on whether, and if so how, to apply a voice test as part of our local television ownership rule. The *Notice* asked whether additional media such as radio stations, daily newspapers, cable systems, DBS, and DARS should count towards any voice test adopted as part of a local TV ownership rule [379] Stated differently, the *Notice* sought comment on what media contribute to viewpoint diversity in local markets Based on the evidence in the record, including our own evaluation of the media marketplace, we find that media outlets other than television stations contribute significantly to viewpoint diversity in local markets, and that our current rule fails to account for this diversity.

177. All of the commenters proposing modification or elimination of the local TV ownership rule argue that there is today an abundance of viewpoint diversity, and that even if the local TV ownership rule is relaxed or eliminated, the market will ensure continued availability of viewpoint and other types of diversity.[380] These commenters contend that, given current levels of diversity in local markets, the Commission cannot justify its current local TV ownership rule on diversity grounds.[381] Commenters further assert that the current rule inappropriately and incorrectly focuses only on television voices, when other media voices clearly contribute to diversity in local markets.[382] Commenters also state that programming other than local news may contribute to viewpoint diversity, and that such programming should be considered in measuring viewpoint diversity.[383]

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[379] *Notice,* 17 FCC Rcd at 18528-29 ¶ 77.

[380] Nexstar Comments at 6-13, Paxson Comments at 28 (asserting that the market and public demand has produced a great diversity of voices, and there is no incentive for large station group owners to "descend upon communities and extinguish the diversity," nor any evidence of an ability or intention to do so); Gray Reply Comments at 4-5, Paxson Reply Comments at 3; NBC En Banc Statement at 4

[381] Alaska Comments at 4-5, Belo Comments at 21-22, Duhamel Comments at 6-7; Fox Comments at 44-47; Granite Comments at 10-11, Gray Comments at 14-15, NAB Comments at 35-39, 44; Nexstar Comments at 8-9; Paxson Comments at 27-30, Sinclair Comments at 22-25

[382] Alaska Comments at 4-5; Belo Comments at 19-22 (daily newspapers, news/talk radio stations, cable news and public affairs programming, weekly newspapers and magazines, and Internet sources contribute to viewpoint diversity even more than television stations); Emmis Comments at 26-30; Fox Comments at 6-10, 50; Gray Comments at 14-15 (viewpoint diversity is guaranteed by availability of news and information from numerous radio and television stations, hundreds of video programming services, MVPDs, daily and weekly newspapers, thousands of periodicals, millions of web sites, and wireless data services); NAB Comments at 32; Pappas Comments at 15; Paxson Comments at 27-28, Sinclair Comments at 25-28. Gray counts low power television ("LPTV") stations among the voices contributing to diversity in markets served by its stations Gray Comments at 10-13. *See also* IPI Comments at 19-20, 24-27 (urging us to consider the role of LPTV stations because LPTV stations may serve as substitutes for other local media for certain consumers and advertisers), Louisville Communications Reply Comments at 2-6; at 2 *See* Letter from Howard M Liberman, Drinker Biddle & Reath, counsel for Nexstar, to Marlene H Dortch, Secretary, FCC (May 16, 2003) at 2-3 ("Nexstar May 16, 2003 Ex Parte").

[383] Fox Comments at 50-51 *See also* Sinclair Comments at 21, 34-38 (if viewpoint diversity means something more than local news, the Commission also should factor in all programming that contributes to an awareness of political and social issues, including national news, non-traditional news, and certain entertainment programming), (continued .. )

178 We agree that television broadcast stations are not the only media outlets contributing to viewpoint diversity in local markets. The market for viewpoint and the expression of ideas is, therefore, much broader than the economic markets, defined above, in which broadcast stations compete In particular, in focusing on the delivered video market alone, we would ignore countless other sources of news and information available to the public.[384] As a corollary, however, limits imposed on television station combinations designed to protect competition in local delivered video markets necessarily also protect diversity, indeed they are more protective of competition in the broader marketplace of ideas given the difference in market definition.

179 We do not, therefore, necessarily disagree with those who maintain that a local television ownership cap can help to protect the public's First Amendment interest in a robust marketplace of ideas[385] We disagree, however, to the extent that they advocate a diversity-based rule that looks to broadcast-only television voices.[386] Accepting this narrowly-defined view would result in a rule that is overly restrictive both for competition and diversity purposes, because it would fail to include other participants in some relevant product markets and in the marketplace of ideas. Such an approach cannot be squared with our statutory mandate under section 202(h) or our desire to minimize the impact of our rules on the rights of speakers to disseminate messages

180. Accordingly, by setting our local television ownership caps only so high as necessary to protect competition in the delivered video market, we will achieve necessary protection for diversity purposes without unduly limiting speech. As set forth above, our current rule is not necessary to protect competition and, indeed, may be harming competition in the delivered video market. It likewise cannot be justified on diversity grounds as it is overly restrictive Our modifications to the rule, discussed below, remedy that failing.

**(ii) Program Diversity**

181 The local TV ownership rule has not traditionally been justified on program diversity grounds. However, the *Notice* sought comment on whether common ownership of multiple stations promotes program diversity, and if so, how this affects the need for the current local TV ownership rule. Commenters supporting relaxation or elimination of the local TV ownership rule assert that a single owner of multiple television stations has an enhanced incentive and ability to offer more diverse

(Continued from previous page)
*but see* NAB Comments at 39-40 (most television and radio programming is entertainment-oriented and does present viewpoints).

[384] *See* MOWG Study No 8, *Consumer Survey on Media Usage* by Nielsen Media Research (Sept. 2002) ("MOWG Study No 8")

[385] AFL-CIO Comments at 3-4, CFA Comments at 54-55; UCC Comments at 2-3; Children Now Comments at 24-28

[386] Several commenters assert that evaluating broadcast-only voices is appropriate because other media are not effective substitutes for television CFA Comments at 176-77, CWA Comments at 8-13; UCC Comments at 29-35, Children Now Comments at 9-12 Specifically, they contend that television broadcast stations remain the public's primary source of local news and public affairs programming, and that other media contribute little or nothing to viewpoint diversity in local markets. *See* UCC Comments at 29-35; Children Now Comments, IPI Comments at 22. They also contend that free over-the-air television is the only source of any video programming for a significant portion of the U S population UCC Comments at 29, 32; Children Now Comments at 9, Smith Comments at 3; IPI Comments at 23-24.

programming.[387] Entravision, which does not take a position on whether the rule should be modified, agrees that same-market combinations give owners an incentive to increase program diversity by reaching out to minority/niche audiences, but is concerned that entities owning more than one station in a market will engage in anticompetitive conduct that will endanger smaller broadcasters already serving niche audiences.[388] Entravision predicts that ultimately, abuse of market power by "consolidated broadcasters" may drive smaller broadcasters out of business, resulting in a mere substitution of programming for minority/niche audiences, rather than actually increasing program diversity.[389] Children Now asserts the diversity of children's programming will be harmed by an increase in same-market combinations, because local broadcasters will repurpose children's programming, resulting in less original programming for children.[390] Children Now urges us to retain the local TV ownership rule to ensure that a single owner of multiple television stations in a market does not offer the exact same programming to children as a means of meeting our children's programming requirements.[391] Alternatively, Children Now urges us to clarify that the use of same programming on multiple commonly owned stations in the same market does not satisfy our children's programming requirements.[392]

182 We find that modification of the current local TV ownership rule may enhance program diversity. As we explained in our discussion of policy goals (Section III(A)(2), *supra*), program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. Our local TV ownership rule will ensure robust competition in local DVP markets. As long

[387] Duhamel Comments at 7 (an owner with two or more stations has a greater incentive to diversify its programming to attract new demographics); Entravision Comments at 5-6 (local duopolies have found that it is more profitable not to duplicate formats, but to "reprogram" one station to target underserved audiences); Fox Comments at 51-52, NAB Comments at 36-37; Nexstar Comments at 11-12; Paxson Comments at 13-14; Paxson Reply Comments at 5 Coalition Broadcasters filed a study comparing the pre-and post-combination advertising revenue and audience shares of their stations in LMAs and duopolies Coalition Broadcasters Comments at 7, Attachment A The study concludes that the combinations result in an average audience share increase of 3 2 points and an average advertising revenue increase of 250 7%. *Id* Coalition Broadcasters believe that, by strengthening their appeal to their local communities and becoming more financially viable, these stations are increasing diversity within their respective markets *Id.*

[388] Entravision Comments at 5-6.

[389] *Id.*

[390] Children Now Comments at 13-17. *See also* UCC Comments at 28 (contending that newspaper-broadcast cross-ownership will result in re-purposing of local news); AFL-CIO at 49-50, AFTRA Comments ¶¶ 42-43 (asserting that media concentration in general causes media outlets to obtain and repurpose material from competitors)

[391] Children Now Comments at 16-17; *Big Media, Little Kids. Media Consolidation and Children's Television Programming, A Report by Children Now* (May 21, 2003) at 2, 5-6, 9 ("*Children Now Report*") (finding that, in the Los Angeles, California DMA, that the number of hours of children's programming aired by television broadcast stations decreased by more than 50% between 1998 and 2003, and that the largest decreases in programming hours occurred at commonly owned stations); *but see,* Letter from John C Quale, Skadden, Arps, Slate, Meagher & Flom, counsel for Fox, to Marlene H. Dortch, Secretary, FCC (May 28, 2003) ("Fox May 28, 2003 Ex Parte") (disputing findings in the *Children Now Report* with respect to television station combinations in the Los Angeles DMA and urging the Commission not to rely on such findings)

[392] *Children Now Report* at 9

as these markets remain competitive, we expect program diversity to be achieved through media companies' responses to consumer preferences Nothing in the record seriously calls that conclusion into question.

183. We share the concern of Children Now that the diversity of children's educational and informational programming could be reduced if commonly owned stations in the same market air the same children's programming A primary purpose of the Children's Television Act of 1990 was to increase the amount of educational and informational programming available to children.[393] It would be inconsistent with this Congressional objective to permit commonly owned stations in a market to rely on the same programming to meet the obligations set forth in Section 73.671 of our rules.[394] We therefore clarify that where two or more stations in a market are commonly owned and air the same children's educational and informational program, only one of the stations may count the program toward the three-hour processing guideline set forth in Section 73.671.[395]

184 Commenters supporting retention of the current local TV ownership rule focus primarily on the importance of the rule to viewpoint diversity, not other forms of diversity. For example, CFA urges the Commission not to focus on protecting the diversity of entertainment programming, but on the diversity of news and information programming, which it ties to the number of owners, not to types of programming [396] Although our modifications to the local TV ownership rule may result in increased program diversity, we are not prioritizing program diversity over viewpoint diversity. Rather, we are revising our entire local television ownership framework to reflect the contribution of other media to competition and viewpoint diversity in local television markets. As an added benefit, today's changes to the local TV ownership rule will allow market forces to yield greater program diversity.

**2. Modification of the Local Television Ownership Rule**

185. Based on our section 202(h) determination that the current local TV rule is no longer necessary in the public interest to promote competition and diversity, as well as our finding that the

[393] Children's Television Act of 1990, Pub L No 101-437, 104 Stat 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394 The Children's Television Act of 1990 and our related rules are premised on the notion that market forces are insufficient to ensure adequate levels of children's programming. *See* S. Rep. No. 227, 101st Cong., 1st Sess. at 9 (1989), *Policies and Rules Concerning Children's Programming,* 11 FCC Rcd 10660, 10676 ¶ 34 (1995)

[394] *See* 47 C F R §73.761.

[395] Under the Section 73.671 processing guidelines, a broadcaster can receive staff-level approval of its renewal application by airing at least three hours per week of programming that satisfies the criteria of programming specifically designed to serve the educational and informational needs of children ("core programming"). 47 C F.R. § 73.671 Note 2. Alternatively, a broadcaster can receive staff-level renewal by showing that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children can count toward the three-hour processing guideline. Licensees not meeting these criteria will have their license renewal applications referred to the Commission

[396] CFA Comments at 176 (asserting that the debate over media ownership "is about news and information for citizens as listeners and speakers, not about entertainment outlets.")

current rule may hinder achievement of our localism policy goal, we must either eliminate or modify our local TV ownership restrictions. As we will explain further below, we conclude that elimination of the rule would result in harm to competition in local DVP markets, thereby harming the public interest. Elimination of the rule also would adversely affect competition in the advertising and program production markets Accordingly, we modify the rule.

186. Our modified local TV ownership rule will allow ownership combinations that satisfy a two-part test. a numerical outlet cap and a top four-ranked standard. Our outlet cap will allow common ownership of no more than two television stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. In counting television stations for purposes of this outlet cap, we will include all full-power[397] commercial and noncommercial[398] television broadcast stations assigned by Nielsen to a given DMA.[399] Our top four-ranked standard will prohibit combinations which would result in a single entity owning more than one station that is ranked among the top four stations in the market based on audience share. Hence, same-market combinations will not be permitted in markets with fewer than five television stations. For purposes of applying our top four-ranked standard, a station's rank will be determined using the station's most recent all-day audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time an application for transfer or assignment of license is filed, the same method as under our current rule.

187 The contour overlap provision of the rule will be eliminated, and the modified rule will be applied without regard to Grade B contour overlap among stations. Thus, if two stations in a market do not have overlapping contours, they still cannot be combined unless there are five or more stations in the

[397] For purposes of counting the television broadcast stations in the market, we will include only full power authorizations. Thus, contrary to the suggestions of some commenters, we will not include Class A TV, LPTV stations or TV translators *See* IPI Comments at 19-20, 24-27; Louisville Reply Comments at 2-6; at 2, Nexstar May 16, 2003 Ex Parte at 2. LPTV stations typically reach only a small portion of any given DMA, even in the few cases where they are carried by cable systems. Thus, the stations do not compete with DVP market participants on a DMA-wide basis, which we have held is the relevant geographic market. We also will exclude from our count any non-operational or dark stations Newly constructed television stations that have commenced broadcast operations pursuant to program test authority also will be included in the DMA count Television satellite stations will be excluded from our count of full power television stations in the DMA where the satellite and parent stations are both assigned by Nielsen to the same DMA. A satellite station assigned to DMA different from that of its parent, however, will be included in the TV station count for that DMA. DTV stations will be included in our count only if they are operating and are not paired with an analog station in the market.

[398] Our current local TV multiple ownership rule does not restrict the number of noncommercial television stations that can be owned by one entity. Consistent with past practice, our modified rule also will not affect ownership of noncommercial television stations Our decision to include noncommercial television stations in the TV station count also is consistent with our past practice and with the fact that noncommercial stations compete for viewers in local markets. *See* 47 C F R § 73 3555(b)(2)(ii) (including noncommercial stations in the count for purposes of the eight-voice test under current local TV rule).

[399] There are a few instances in which a station's community of license is physically located in one DMA, but the station is assigned by Nielsen to a different DMA We clarify that for purposes of our local TV ownership rule, a station will be considered to be "within" a given DMA if it is assigned to that DMA by Nielsen, even if that station's community of license is physically located outside the DMA. In addition, we recognize that certain geographic areas (specifically, Puerto Rico, Guam, and the U.S. Virgin Islands) are not assigned a DMA by Nielsen. For purposes of our local TV ownership rule, Puerto Rico, Guam, and the U.S Virgin Islands each will be considered a single market

market and at least one station in the combination is not among the top four. We have determined that, because of mandatory carriage requirements, the DMA – not the area within a particular station's Grade B contour—is the geographic market in which DVP providers compete. Therefore, permitting station combinations solely on grounds that they do not have overlapping contours would be inconsistent with our market definition As we explained above, the majority of viewers—including those who reside in geographically large DMAs—have access to television broadcast stations that they could not view over-the-air because they can view the stations via cable. Increasingly, local stations also are available via DBS To avoid imposing an unfair hardship on parties that currently own combinations that do not comply with the modified rule, we will grandfather existing combinations, as discussed further below. In addition, because our assumption regarding DMA-wide carriage is not universally true, and in recognition of the signal propagation limitations of UHF signals, we adopt herein a waiver standard that will permit common ownership of stations where a waiver applicant can show that the stations have no Grade B overlap and that the stations are not carried by any MVPD to the same geographic area.

188. The public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing viewers.[400] Below, we discuss how our analysis of competition in local DVP markets supports the modified rule.

**a. Evaluating Potential Competitive Harms Within Local DVP Markets.**

189. Consistent with our competition policy goal, our local television ownership rule seeks to preserve a healthy level of competition in the market for DVP. The state of competition in this market affects the quality and diversity of programming content and therefore the overall welfare of DVP viewers. In formulating our local TV multiple ownership rule, we must assess the nature of this competition and weigh the potential benefits and anticompetitive harms that may arise from the increase in market concentration that results from a single firm owning multiple broadcast stations in a market.

190. There are two potential competitive harms that may be caused by a single firm owning multiple television stations in a market. First, ownership of multiple stations may result in "unilateral effects," *i e.*, the firm acquiring multiple licenses may find it profitable to alter its competitive behavior unilaterally to the detriment of viewers. An example of such an effect would be the decision to cancel local news programming on one of the commonly-owned channels. Second, the acquisition of multiple licenses in a local market by a single firm may lead to "coordinated effects." That is, the increase in concentration may induce a joint change in competitive behavior of all the market participants in a manner that harms viewers.

191. We recognize the importance of competition from cable networks in the market for DVP. Indeed, viewing of cable network programming now accounts for approximately half of all television

[400] For a discussion of program provision under different market structures, *see*, Peter Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio* Broadcasting, 66(2) Q J. ECON 194-223 (1952); MOWG Study No 6, A Theory of Broadcast Media Concentration and Commercial Advertising by Brendan C. Cunningham and Peter J. Alexander (Sept 2002) at 3-5 ("MOWG Study No. 6"), and Sinclair Comments, Baumann/McAnneny Statement at 2-6

viewership[401] Nevertheless, in formulating our revised ownership rules, we continue to draw a distinction between television broadcast stations and non-broadcast DVP outlets. This is because television broadcast stations and cable programming networks have different incentives to react to a change in local market concentration, which suggest differing levels of unilateral and coordinated effects. In particular, cable networks are almost exclusively offering national or broadly defined regional programming Therefore, the profit-maximizing decisions of a national cable programmer reflect conditions in the national market. It is improbable that a change in concentration in any single local market would affect the competitive strategy of a national cable network. In contrast, we need to consider the possible competitive responses from other DVP outlets in local markets, which are almost exclusively television broadcast stations. Because of the differing footprints of cable networks and television broadcast stations, any possible competitive harms are more likely to arise from changes in the behavior of stations. Thus, our rules to promote local television competition are focused on ownership of television broadcast stations.

**b. Welfare Enhancing Mergers in Local Delivered Video Markets.**

192 The standard approach to evaluating the competitive harms of an increase in horizontal market concentration is outlined in the DOJ/FTC Merger Guidelines. The DOJ/FTC Merger Guidelines recognize the HHI level of 1800 as the maximum level of "moderate concentration."[402] We choose this threshold rather than the lower limit of 1000 because we recognize the competitive pressures exerted by the cable networks. The 1800 threshold corresponds to having six equal-sized competitors in a given market. The DOJ/FTC Merger Guidelines however, are written not for a specific industry, but rather as guidelines intended for application across all industries. Our rules are formulated for a specific market—the delivery of video programming—and are based on an extensive record on the extent of competition in this market and the effect of our current local TV ownership rule. This record allows us to craft a more finely-tuned rule for this industry.

193 First, the nature of the DVP market is such that there is constant product innovation with new program choices each season. In such a market, a firm's market share is more fluid and subject to change than in other industries. Hence a firm's "capacity" to deliver programming can be as important a factor in measuring the competitive structure of the market as is its current market share. Second, as each broadcast station requires a license, the number of licenses that a firm controls in a market is the measure of its capacity to deliver programming. Therefore, as a starting point, a simple application of the *DOJ/FTC Merger Guidelines* six-firm threshold suggests that, a single firm holding three licenses in a market with 18 or more licenses, or a firm holding two licenses in a market with 12 or more licenses, would not raise competitive concerns. However, as explained below, given the structure of the DVP market, a strict, overly simplistic application of the *DOJ/FTC Merger Guidelines* would potentially prohibit some welfare enhancing mergers and allow some anticompetitive mergers.

194. *Ownership of multiple stations can lead to significant efficiencies.* The record demonstrates, for example, that same-market combinations have resulted in an increase in viewership of the lower-ranked of the two stations in the combination, evidencing a welfare enhancing effect for

[401] In June 2002, cable networks for the first time collectively exceeded a 50% share for the month (54% primetime share), while the broadcast networks collectively registered a 38% primetime share. *See* Romano, *supra* note 251 at 12

[402] *DOJ/FTC Merger Guidelines* § 1 51